



COMMONWEALTH of VIRGINIA

JAMES W. STEWART, III
COMMISSIONER

DEPARTMENT OF
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

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MEMORANDUM

TO: DBHDS Licensed Providers
CSB Executive Directors

FROM: Les Saltzberg, Ph.D
Director, Office of Licensing

DATE: June 1, 2012

RE: Licensing Regulation Compliance: Criminal Records Retention

DBHDS licensed providers must comply with the background check procedures outlined in Virginia Code §§ 37.2-416, 506 and 607 (See also DBHDS Licensing regulations: 12 VAC 35-105-400 & 430). DBHDS Background Investigations Unit (DBHDS BIU) is responsible for processing criminal background check requests for all licensed providers, except children's residential facilities and community services boards/behavioral health authorities.

Additionally, all providers are required to comply with state/federal laws and regulations regarding criminal history record retention. State and Federal law and regulations prohibit secondary dissemination of criminal history records (See Va. Code § 19.2-389 and US Code 28 U.S.C. 534 & 28 CFR 20). Information is obtained from the Virginia State Police and FBI for the specific purpose of determining fitness for employment in direct consumer care and supervisory positions.

After the provider has evaluated criminal history information and determined whether the applicant is fit for employment, the following procedures apply:

Procedures:

- Providers must safeguard both criminal records and their content and copies must not be furnished to anyone.
- Criminal records shall be destroyed by shredding or incinerating after they have served the purpose for which they were obtained.
- Criminal records shall not be maintained in personnel files.
- Providers shall record any charges/convictions appearing on the Virginia record on the Applicant Arrest/Conviction Data Sheet (DBHDS BIU *Procedures*, Attachment 11). Also, you should compare the Virginia record with the individual's *Disclosure Statement* to ensure that an applicant has disclosed all pending charges and convictions.

The following documentation retention procedures are required only for providers that submit their criminal background requests to DBHDS BIU but may be used as guidance for CSBs and Behavioral Health Authorities:

- Providers shall retain the following documentation in a separate confidential file:
 - applicant's "Eligibility" letter;
 - *memoranda* received from BIU regarding the VSP results;
 - copy of the *Disclosure Statement* (attachment 3, DBHDS BIU *Procedures*);
 - all other correspondence received from BIU (i.e., FBI and/or VSP non-classifiable memoranda, Form #004, etc.)
 - copies of attachments 4, 5 & 8 (DBHDS BIU *Procedures*);
 - attachment 11, if applicable (DBHDS BIU *Procedures*); and
 - completed attachment 12, if applicable (DBHDS BIU *Procedures*).

The above-referenced attachments may be found at <http://www.dbhds.virginia.gov/OL-BackgroundInvestigation.htm>.

Providers should follow the above procedures to ensure compliance with the licensing regulations regarding record(s) retention. I have attached some additional interpretive guidance that may be helpful in handling these records. Should you have any questions about this guidance, contact Stephanie Willinger at (804) 786-5858 or stephanie.willinger@dbhds.virginia or follow-up directly with the DBHDS BIU by contacting Malinda Roberts at (804) 786-6384 or at malinda.roberts@dbhds.virginia.gov.

DBHDS Licensed children's residential facilities only should follow similar guidance issued by the Department of Social Services, Office of Background Investigations (DSS OBI) at: http://www.dss.virginia.gov/files/division/licensing/crf/intro_page/background_investigations/guidance_procedures/bi_procedures.pdf.

Attachment

SW/

C: Chanda Braggs, Licensing Associate Director
Kevin Schock, Associate Director
DBHDS Licensing Specialists
Stephanie Willinger, Licensing Consultant

DBHDS Office of Licensing Additional Guidance Document
Criminal History Record(s) Retention

The purpose of this document is to provide additional guidance to clarify portions of the DBHDS licensing regulation requirements regarding submitting and maintaining criminal history record information. DBHDS Licensing regulations require providers to comply with background check requirements under Virginia Code §§ 37.2-416, 506 and 607.

Providers are required to maintain specific documentation that supports compliance with the background check requirements to include: (1) Disclosure Statement (an applicant is required to disclose convictions or charges that may be a “barrier” to employment); and (2) Documentation of provider submission requests for criminal history background checks and requests to search the Department of Social Services’ Child Protective Services “Central Registry” for investigations of child abuse or neglect. This documentation also includes “*memoranda* from the department transmitting the *results* to the provider...” (See 12 VAC 35-105-400, *Criminal Registry Checks*).

For all providers except Community Services Boards, Behavioral Health Authorities, and children’s residential facilities, the **DBHDS Background Investigations Unit (BIU)** transmits “eligibility” *memoranda* to each provider indicating the **results** of an applicant’s national¹ fingerprint-based criminal history search.

This *memoranda* may also include if applicable, a copy of an applicant’s **Virginia** criminal history record or “rap sheet”. Although DBHDS BIU and governmental entities (to include CSBs) are authorized by state law to receive portions of the FBI criminal record to determine employment eligibility, they are not permitted to further disseminate FBI criminal records. Federal regulation(s) require states to properly transmit, retain and dispose of criminal history record results. Virginia State Police (VSP) ensures regulatory compliance regarding criminal history records through its repository, the Central Criminal Records Exchange (CCRE) (See Virginia Code § 19.2-389). According to the VSP, “criminal records must be destroyed (shredded or burned) when they have served the purpose for which they were requested” (See *Virginia Criminal Information Network Operating Manual*, section 11-9-30). DBHDS and providers must be in compliance with all federal/state criminal history records retention requirements.

However, additional clarification is necessary to resolve the apparent conflict between the above VSP criminal record retention requirements and the DBHDS licensing regulations. For example, some of the specific documentation listed under the *personnel records* (retention) section of the DBHDS licensing regulations, require providers to maintain the “**results** of the required criminal background checks...” (Emphasis added; See 12 VAC 35-105-430.6). The *results* should not be interpreted to include keeping copies of criminal history record results or “rap sheets” in an official *personnel file*. The *results* may include, an eligibility *memorandum* from the DBHDS BIU or a summary “note” indicating the effect of the results on a positive hiring decision. This documentation is sufficient for DBHDS

¹ National fingerprint-based criminal history search includes a search of the Virginia State Police (CCRE) criminal history database and a search of the FBI criminal history (U.S.) database.

licensing regulatory compliance purposes. Otherwise, criminal history records must be destroyed after they have served their purpose in determining employment eligibility.

DBHDS BIU Procedures for Conducting Background Investigations also provides appropriate guidance and documentation to assist DBHDS licensed providers in compliance with federal/state laws and regulations regarding criminal history record retention. DBHDS BIU Procedures state in part:

Providers must safeguard both the records and their content. Records shall be destroyed by shredding or incineration after they have served the purpose for which they were obtained. They shall not be maintained in personnel files. Information is obtained from the Virginia State Police and FBI for the specific purpose of determining fitness for employment in a direct consumer care position

(See *Procedures for Conducting Background Investigations*, Section(s) XII & XIII or at <http://www.dbhds.virginia.gov/documents/bg-CriminalBGCheckProcedures.pdf>) .

Similar guidance is also offered to state agencies by the Department of Human Resource Management(DHRM) and may be useful for DBHDS licensing regulation compliance. DHRM suggests that information used from a criminal history record to deny employment may be documented in a summary and only maintained in separate part of a recruitment file, not in the personnel file (See Department of Human Resource Management [DHRM] policy 2.10, *Hiring*). DHRM further advises in part:

- Agencies are advised to retain the fingerprint-based criminal history report in a locked, separate file during the hiring process, to destroy the report after a hiring decision is made, and to retain a brief note regarding the outcome in a confidential portion of the recruitment file.
- For the applicant rejected because of background information, the note should indicate that this applicant was the preferred choice based on qualifications, interview, etc., but did not receive an offer (or had a conditional offer retracted) because of information obtained through a criminal records check
- For the person hired, the note should indicate that as of mm/dd/yy, a criminal records check revealed no problem areas related to this employment. Agencies may elect to keep a copy of this brief note also in a confidential section of the personnel file.



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MEMORANDUM

TO: CSB Executive Directors

FROM: Kathy Drumwright, Assistant Commissioner
Quality Management and Development

DATE: November 6, 2013

RE: **Update** Licensing Regulation Compliance: Criminal Record Retention

The purpose of this **update** is to provide additional guidance related to criminal background checks and to identify a change to the audit responsibility for this standard effective immediately as of the date of this memo. As you are aware, the June 1st 2012 Memorandum from Dr. Les Saltzberg indicated that all DBHDS licensed providers must comply with the criminal background check requirements in Virginia Code §§ 37.2-416, 506, and 607.

DBHDS licensed providers must also comply with DBHDS licensing regulations that require retention of minimum documentation that verifies completion of criminal history records and Central Registry checks (See 12 VAC 35-105-400 at <http://www.dbhds.virginia.gov/documents/Chapter%20105%202013.pdf>). At a minimum, the required verification documentation includes: (1) the *Disclosure Statement*; and (2) a summary of the documentation submitted to complete the criminal background and central registry checks.

Other supporting information may also be used and retained to verify compliance. For example: (1) If using "Live Scan" (electronic submission of fingerprints) a print out may be provided that shows a list of names/dates of submissions and a status (for example, "record in process", "prints rejected by FBI", etc.) - this is the "NCJ View Information, VSP Detail Report" (it should show "request type-fingerprint search"); (2) If mailing hard-copies of fingerprint-cards, an itemized list of employee names with the cards sent to VSP; a copy of that itemized list and a copy of the fingerprint card and when processed the card will bear a stamp from the VSP that verifies processing; or (3) Copies of any similar documents as those listed in the June 1st memorandum. A copy of the June 1st memorandum from OL will not be considered verification of compliance. Additionally,

please keep in mind that you should not keep a copy of the actual criminal record ("rap sheet") in any files after you render a final employment decision.

Your records retention policy should include details and timeframes regarding the records that you are required to maintain and any additional supporting documents referenced above to verify compliance with background check requests.

For those of you who are currently or have recently received audits from DMAS regarding criminal background checks, the expectations for compliance are considered met if you have complied with the items described in the first two paragraphs of this memo. Some of you have referenced Virginia Code 32.1-162.9:1 and questioned whether this is an applicable standard as part of this review. It is not considered an applicable standard for this purpose. It is the intent of both DMAS and DBHDS to assure the best possible coordination with standards and regulatory compliance. Going forward, as DBHDS Licensure must already verify compliance with background checks as part of the licensure process, it is agreed that DMAS will work together with DBHDS on this issue. If there are findings or concerns by DBHDS Department of Licensing, DMAS will be notified.

If you have any questions regarding licensing regulation compliance, please contact Stephanie Willinger at stephanie.willinger@dbhds.virginia.gov and questions regarding background checks may be directed to Malinda Roberts at malinda.roberts@dbhds.virginia.gov.

C Les Saltzberg, Director of Licensing, DBHDS
 Stephanie Willinger, Licensing Specialist/Consultant
 Malinda Roberts, BIU Supervisor
 Stacy Pendleton, HR Manager
 DBHDS Licensing Specialists
 Karen Kimsey, Deputy Director of Complex Care, DMAS
 Louis Elie, DMAS Audit Director, DMAS